Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

and

KEARNEY & TRECKER CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY AND TRECKER CORPORATION

DAVID J. CANNON
JAMES C. MALLATT
JACOB L. BERNHEIM
JOHN R. SAPP
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-6560
Attorneys for Respondent
KEARNEY & TRECKER CORPORATION

Of Counsel:
MICHAEL, BEST & FRIEDRICH
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203 (1975), and reprinted in the Petition for Certiorari here (P.A-2ff).[1] The opinion of the Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are not officially reported but appear in the Petition at P.A-15ff and P.A-22ff, respectively.

[1] References to pages of the Appendix of the Petition will be cited as "P.A- ". Pages in the single Appendix will be cited as "A.".

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for Petitioners ("Pet. Br.").

QUESTION PRESENTED

May the State of Wisconsin prohibit a Union-directed concerted refusal to work overtime, a partial-strike activity which is neither protected nor prohibited by Federal law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appendix (*infra* p. 32).

STATEMENT

The Kearney & Trecker Corporation ("Kearney & Trecker" or "Employer") is engaged in the manufacture of machine tools at West Allis, Wisconsin. At all times relevant hereto, the hourly employees at Kearney & Trecker have been represented by Lodge 76, International Association of Machinists and Aerospace Workers ("Union" or "Lodge 76").

Prior to March 7, 1972, Kearney & Trecker employees represented by Lodge 76 had been scheduled for and had worked a "substantial amount" of overtime. (A. 21; P.A-32) In fact, on Saturday, March 4, 1972, approximately 354 employees worked overtime. (Co. Ex. 1; A. 33, 51; P.A-32) Although employees had previously been allowed, individually, to refuse overtime at the option of supervision, there had been no general, or concerted, refusal to do so. (R. 22, 24) Only five percent of the employees had consistently declined to work overtime. (A. 22; P.A-32)

On March 7, 1972, while negotiations for a new labor agreement[2] were continuing, the members of the Union met pursuant to notice from the Union and unanimously adopted a resolution directing that no member should work overtime, overtime being defined as working in excess of 7½ hours per day or 37½ hours per week. (A. 20, 25-26; P.A-31) On March 16, representatives of the Union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the members "will continue in effect until a labor agreement is signed" (A. 26-27; P.A-32). Despite requests from Kearney & Trecker, the Union declined to ask the membership to rescind the ban on overtime. From March 11, 1972 until July 23, 1972 no employees worked overtime (with the exception of the three employees who worked overtime on only one day), even though the Employer had scheduled many of the employees for overtime on numerous occasions during that period (A. 26, 28-29, 32; P.A-32, 33).

On June 12, 1972 the Employer filed a charge with the National Labor Relations Board ("NLRB") alleging, among other things, that the Union had violated Section 8(b)(3) of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §158(b)(3) by its ban on overtime (Co. Ex. 7; A. 29, 55-59). On June 27, 1972 the NLRB Regional Director refused to issue a complaint on the ground that the Union's action was not

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[2] The prior labor agreement had expired on June 19, 1971 (P.A-26; A. 34), but the Union had not gone out on strike.

prohibited by the NLRA, citing this court's decision in *Insurance Agents.*[3] That refusal stated, in part:

> *"Dismissal by this Agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act."* (Co. Ex. 3; A. 33, 52-54). [Emphasis Supplied]

On June 15, 1972, the Employee filed a complaint with the Wisconsin Employment Relations Commission ("WERC") (A. 3-6). After a hearing, a WERC examiner found, on February 26, 1973, that the Union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the Employer's production and that the Union had therefore violated Section 111.06(2)(h), Wis. Stats., which prohibits, *inter alia,* engaging "in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (p. 32, *infra*) The examiner rejected the Union's challenge to the WERC's jurisdiction on the basis of this Court's decision in *Garmon,*[4] concluding that "a concerted refusal to work overtime is neither a protected activity under Section 7 [of the NLRA] nor a prohibited activity under Section 8 of the [NLRA]" (P.A-48). The WERC unanimously adopted the examiner's decision as its own on April 23, 1973 (P.A-22-23). On August 24, 1973 that decision was affirmed by the Circuit Court of Milwaukee County,

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[3] *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477 (1960).

[4] *San Diego Building Trades Council, et al v. Garmon, et al,* 359 U.S. 236 (1959).

which also rejected Petitioner's pre-emption arguments on the basis of prior decisions of this Court (P.A-15-21).

The Union then appealed to the Wisconsin Supreme Court. On appeal, the Union did not deny that it had violated the Statute in question, but again argued that Wisconsin's authority to enjoin such conduct had been pre-empted by Federal law. Relying on prior decisions of this Court, including those in *Garmon,*[5] *Garner,*[6] and *Briggs and Stratton,*[7] the Wisconsin Court unanimously rejected the Union's argument, stating "since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the Federal Labor Act the judgment appealed from must be affirmed" (P.A-14).

SUMMARY OF ARGUMENT

The decision below should be affirmed on the basis of this Court's decision in *Briggs and Stratton* where the authority of Wisconsin to enjoin conduct *very similar* to the concerted refusal to work overtime here at issue and under the *very statute in question,* was upheld. Neither Congress nor this Court has rejected the basic holding of *Briggs and Stratton* — that the states may regulate conduct, such as that involved here, which is neither protected nor prohibited under federal law. As a result, Wisconsin has been able to remedy such unprotected, but coercive, conduct effectively without requiring that

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[5] See Note 4, *supra.*

[6] *Garner, et al v. Teamsters, etc. Local No. 776, et al,* 346 U.S. 485 (1953).

[7] *International Union, U.A.W., A. F. of L., Local 232, et al v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949), commonly referred to as "Briggs and Stratton".

remedy to be borne by employees caught between the Company and the Union.

Even in the absence of *Briggs and Stratton,* the right of Wisconsin to enjoin the Union's concerted refusal to work overtime would be clear under this Court's *Garmon* doctrine since such conduct is not even arguably protected or prohibited. The exception to *Garmon* set forth in this Court's decision in *Morton*[8] is inapplicable here since the requisite Congressional "focusing upon" the conduct in question is not present. Similarly, there has been no evidence of any congressional determination to oust state authority over this narrow area.

Although the conduct at issue is not even "arguably" protected, we submit that this Court should revise the *Garmon* rule to apply only to conduct which is actually protected. The present procedure has created an intolerable situation in which an employer faced with arguably protected conduct can only obtain a ruling on the nature of the conduct by intentionally taking actions which may constitute unfair labor practices and subject him to substantial liabilities.

ARGUMENT

I. THE AUTHORITY OF WISCONSIN TO ENJOIN A CONCERTED REFUSAL TO WORK OVERTIME IS FULLY SUPPORTED BY THIS COURT'S DECISION IN *BRIGGS AND STRATTON.*

Petitioners would deny Wisconsin the power to enjoin a concerted refusal to work overtime, a practice which has been denied the protection of Section 7 of the National Labor Relations Act in a long and unbroken line of decisions.[9] Yet, the authority of Wisconsin to do just that was settled by this Court in *Briggs and Stratton.*[10] There, the union had put pressure on the employer by calling a series of union meetings during working hours. The WERB[11] enjoined the union's action pursuant to Section 111.06(2)(h), Wis. Stats., (Pet. Br. 35) the *very statute* involved in this case. On appeal, this Court upheld Wisconsin's right to enjoin that conduct, stating (336 U.S. at 264-265):

> "We think this recurrent or intermittent unannounced stoppage of work to win unstated ends was *neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act* . . . .
>
> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct *neither made a right under Federal Law nor a violation of it* and which has the coercive effect obvious in this device." [Emphasis Supplied]

The close similarity between the Union's conduct, here, and that in *Briggs and Stratton* is apparent. In both cases, the unions allowed their members to work *only a portion* of their normal hours. In both cases the union imposed severe economic pressure[12] on the em-

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[8] *Local 20, Teamsters, etc. v. Morton,* 377 U.S. 252 (1964).

[9] *E.g., John S. Swift Co.,* 124 NLRB 394 (1959), *modified and enf'd.* 277 F. 2d 641 (7th Cir. 1960); *Decision, Inc.,* 166 NLRB 464 (1967); *First National Bank of Omaha v. NLRB,* 413 F. 2d 921, 925 (8th Cir. 1969); *Prince Lithograph Co., Inc.,* 205 NLRB 110; *Valley City Furniture Co.,* 110 NLRB 1589 (1954); *Polytech, Inc.,* 195 NLRB 695 (1972).

[10] See Note 7, *supra.*

[11] The Respondent WERC was then known as the Wisconsin Employment Relations Board ("WERB").

[12] As a direct result of the Union's actions, Kearney & Trecker fell behind in deliveries, lost orders, incurred contract penalties, and was no longer in control of its own production (A. 43-46).

ployer without union members suffering the economic consequences of a strike. Both types of conduct have been repeatedly held to constitute unprotected partial strikes by the NLRB. E.g., *Valley City Furniture Co.,* 110 NLRB 1589 (1954) *enf'd.* 230 F. 2d 947 (6th Cir. 1956) (concerted refusal to work overtime); *Daniel A. Donovan, et al.,* 206 NLRB 688 (1973) (intermittent work stoppages); *Honolulu Rapid Transit Company,* 110 NLRB 1806 (1954) (intermittent work stoppages).

Moreover, the decision in *Briggs and Stratton* made clear that its holding was equally applicable to a concerted refusal to work overtime. In concluding that the work stoppages there were not protected by Section 7 of the NLRA, the Court cited "similar cases" holding "comparable work stoppages" to be unprotected, including *C. G. Conn, Ltd. v. NLRB,*[13] in which a *concerted refusal to work overtime* was held to be unprotected. 336 U.S. at 257.

Although subsequent decisions of this Court have declined to follow the "approach" of *Briggs and Stratton* under which the Court determined for itself the protected or prohibited nature of an activity, this Court has never abandoned its basic holding that states may enjoin partial strikes which are neither protected nor prohibited under Federal law. Rather, this Court has cited *Briggs and Stratton* with approval in several cases including *O'Brien,*[14] *Weber,*[15] and even the *Garner* de-

[13] 108 F. 2d 390 (7th Cir. 1939).

[14] *International Union, United Automobile, etc. Workers v. O'Brien,* 339 U.S. 454, 459 (1950).

[15] *Weber v. Anheuser-Bush, Inc.,* 348 U.S. 468, 476 (1955). There, Mr. Justice Frankfurter, the author of *Garmon,* noted cases in which the authority exercised by the state was found "not to have been exclusively absorbed by the federal enactments" including *Briggs and Stratton* where "[c]onduct was neither protected nor prohibited . . . and *thus was open to state control.*" [Emphasis Supplied]

cision relied upon by the Union. In *Garner* this Court, citing *Briggs and Stratton,* stated (346 U.S. at 488):

> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore is 'governable by the state or is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers."

More recently, the basic holding of *Briggs and Stratton* was reiterated by Mr. Justice White in his concurring opinion (joined in by The Chief Justice and Mr. Justice Stewart) in *Ariadne Shipping Co.*:[16]

> "The only possible dispute could be over whether the picketing was activity protected by Section 7 of the Act or whether the picketing was *neither protected nor prohibited by the Act and therefore was subject to state regulation or prohibition.*" [Emphasis Supplied]

Although *Garmon*[17] both amplified the protected-prohibited test set forth in the earlier cases, including *Briggs and Stratton,* and declined to follow its "approach", it did not disturb its substantive holding. In fact, the continued vitality of that holding was expressly confirmed by the concurring opinion of Mr. Justice Harlan, joined by three other Justices. He stated (359 U.S. at 253, n. 5):

> "The court may be correct in stating that 'the approach taken in [*Briggs and Stratton*] in which the Court undertook for itself to determine the status of the disputed activity has not been followed in later decisions and is no longer of general applica-

[16] *International Longshoremen's Association, Local 1416, AFL-CIO v. Ariadne Shipping Co., Ltd., et al,* 397 U.S. 195, 201 (1970).

[17] *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

tion'. That, however, has nothing to do with the vitality of the holding *that there is no pre-emption when the conduct charged is in fact neither protected nor prohibited.* To the contrary, that holding has remained fully intact, . . ." [Emphasis Supplied]

Briggs and Stratton is clearly on point and fully supports the decision of the Wisconsin Court in this case. Although announced over 26 years ago, *Briggs and Stratton's* basic holding has never been rejected either by Congress or this Court. No evidence has been presented to show that, during that long period, it has produced any imbalance in collective bargaining in Wisconsin or elsewhere. To the contrary, it has provided a method by which coercive, unprotected conduct can be remedied without resort to generally self-defeating, self-help measures which punish only the individual employee who has been directed to withhold his services and not the perpetrating union. We submit such methods are valuable and should be retained, and the holding of *Briggs and Stratton* reaffirmed.

II. THE AUTHORITY OF WISCONSN TO ENJOIN PETITIONER'S UNPROTECTED CONDUCT HAS NOT BEEN REMOVED BY THIS COURT'S HOLDINGS SINCE *BRIGGS AND STRATTON.*

The currently controlling test of Federal pre-emption was set forth in this Court's decision in *Garmon:*

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.
>
> * * *

> ". . . When an activity is *arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board* if the danger of state interference with national policy is to be averted." (359 U.S. at 244-245) [Emphasis Supplied]

However, a corollary to that holding is that of *Briggs and Stratton* — where conduct is neither *arguably protected nor prohibited* by federal law, state regulation is not precluded. See *Garner, et al v. Teamsters,* 346 U.S. at 488; *Weber v. Anheuser-Busch, Inc.,* 348 U.S. at 476; *San Diego Building Trades Council v. Garmon,* 359 U.S. at 253, n. 5 (Harlan, J. concurring); *International Longshoremen's Association, Local 1416 v. Ariadne Shipping Co.,* 397 U.S. at 201 (White, J. concurring). Although we submit that the *Garmon* doctrine should not be applied to conduct which is only "arguably" protected, the authority of Wisconsin to enjoin this particular type of conduct is clear even under the full *Garmon* rule.

A. The Union's Concerted Refusal to Work Overtime Was Not Even Arguably Protected or Prohibited by Federal Law.

In *Briggs and Stratton* this Court held a partial strike, very similar to that here, to be neither protected nor prohibited and that holding is equally applicable in this case.[18] However, the unprotected nature of that activity has *also* been settled "with unclouded legal significance"

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[18] Although this Court has expressed concern as to the decision's holding regarding the §8 or "prohibited" issue because the matter was "not litigated seriously", no such reservation was expressed regarding the Court's holding that such conduct was not protected under §7. *National Labor Relations Board v. Insurance Agent's International Union, AFL-CIO,* 361 U.S. 477, 493-494, n. 23 (1960).

by the NLRB as well and not even the union[19] asserts that it was prohibited.

One of many decisions of the National Labor Relations Board holding a concerted refusal to work overtime to be beyond the protection of federal law is *Valley City Furniture Co.*, 110 NLRB 1589 (1954). There, as here, the union banned the working of overtime as a bargaining tactic. The Board stated (110 NLRB at 1594-1595):

> "We find that the partial strike (refusal of overtime) called by the Union from its very inception was the sort of *activity which, although concerted, is not,* as against the action by the Respondent, *entitled to the protection of the Act.* The vice in such a strike derives from two sources. First, the Union sought to bring about a condition, *that would be neither strike nor work.* And, second, in doing so, *the Union in effect was attempting to dictate the terms and conditions of employment . . .*" [Emphasis Supplied]

Accord: *John S. Swift Co., Inc.*, 124 NLRB 394 (1959), *modified and enf'd.* 277 F. 2d 641 (7th Cir. 1960); *Decision, Inc.*, 166 NLRB 464 (1967).

The Board only recently reaffirmed and explained this line of decisions in *Polytech, Inc.*, 195 NLRB 695, 696 (1972), stating:

> "The holding in *Swift* (*John S. Swift Co., supra*) that the concerted refusal to work overtime was unprotected, reasons that when employees engage in repeated work stoppages limited to a portion of the

[19] Petitioners also did not believe their conduct to be protected in the earlier stages of this case. In the Wisconsin Circuit Court, they not only did not argue in their brief that it was protected, they conceded "that a concerted refusal to work overtime is neither protected nor prohibited under the federal Act." (App. Cir. Ct. Br. 5). We believe their original position to have been the correct one.

> working day, *they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay.* The principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform *all of the work they were hired to do.*" [Emphasis Supplied]

Such conduct has also been held to be unprotected by the U.S. Courts of Appeal. Thus, on this issue, the Eighth Circuit recently stated in *First National Bank of Omaha v. NLRB,* 413 F. 2d 921, 925 (8th Cir. 1969):

> "The test in each case is whether the employees have assumed the status of strikers. They cannot continue to work the regular hours of employment and refuse to work overtime."

Accord: *C. G. Conn, Ltd. v. NLRB,* 108 F. 2d 390 (7th Cir. 1939).

The Union insists, however, that overtime at Kearney & Trecker was totally optional and that as a result the employees' refusal to work overtime was protected conduct under the Board's decision in *Dow Chemical*[20] (Pet. Br. 28-30). We submit they are mistaken on both counts.

There was *no* contractual provision or practice at Kearney & Trecker which authorized a concerted or universal refusal of overtime or even granted an unlimited right of refusal to an individual. In fact, the then expired labor agreement between the parties contained *no* grant of *any right* to refuse overtime. Rather, Section 203 of that agreement (Jt. Ex. 1; A. 17, 50) expressly recognizes that:

> "[t]he direction of the working force including the right . . . to determine . . . the schedules and standards

[20] *Dow Chemical Co.*, 152 NLRB 1150 (1965).

> of production . . . is vested exclusively in the Company, . . ."

Similarly, Exhibit "J" to that agreement (Jt. Ex. 1; A. 17, 50-51) stated in Section 295:

> "Generally, when overtime is necessary a job has become critical and nothing can stand in the way of its completion."

Employees had, however, been allowed, *individually,* to refuse overtime (A. 22). Although one company witness did describe the acceptance of overtime as "optional" (A. 38-39), that same witness pointed out that "the option of overtime was given to the supervisor." (A. 24)

The conduct found by the Board to be protected in *Dow Chemical Co., supra,* was not a continued refusal to work overtime scheduled by the employer, but rather a one-time failure by employees to "volunteer" for extra duty. In fact, the Board in *Dow* expressly distinguished that case from a situation in which the employees "refused *scheduled overtime work.*" 152 NLRB at 1152 (emphasis is that of the NLRB).[21] Here, the overtime ban formally adopted by the Union, resulted in a four month refusal to work overtime, even though Kearney & Trecker did schedule many employees for overtime work on various occasions during that period. (A. 26, 28-29, 32; P.A-32-33).

Moreover, the employees in *Dow* apparently had no obligation whatsoever to volunteer for extra duty. In contrast, Kearney & Trecker had the right to schedule and to

[21] Petitioners erroneously state that Dow employees "were asked beforehand whether they wanted weekend work and were free to decline it." (Pet. Br. 28) "The practice at [Dow] was for employees who wished to volunteer for weekend work to indicate that fact to [Dow] on the Wednesday prior to the weekend," a distinction obviously important to the Board's decision. 152 NLRB at 1152, n. 3.

require overtime under its contract and there was no practice which authorized a concerted refusal such as that which occurred here. Moreover, overtime at Kearney & Trecker was not extra duty, it was simply part of the job. The employees here had traditionally worked a "substantial amount" of overtime and only five percent had consistently refused to do so.[22] (A. 21-22; P.A-32). In fact, over 350 had worked overtime on the Saturday before the Union's ban (Co. Ex. 1; A. 33, 51; P.A-32). By refusing to perform that scheduled work the employees were, at the direction of the Union, rather than by exercising their individual choice, refusing to "perform all the work they were hired to do" and thus engaging in unprotected conduct. *Polytech, Inc.,* 195 NLRB at 696.

The impact of a practice of having previously worked overtime is apparent from the NLRB's holding in *Decision, Inc.,* 166 NLRB 464 (1967) where, as here, the employees had "as a matter of practice worked overtime hours when needed." Holding their concerted refusal to work overtime to be unprotected, the Trial Examiner, whose decision was adopted by the Board, noted (166 NLRB at 479):

> "The employees involved had as a matter of practice worked overtime hours when needed. *The Respondent's business was geared to such a practice. Under such circumstances the working of overtime was a regular job function of the employees involved. The employees' refusal to work overtime constituted in effect a refusal to work or to strike as regards part of their working hours.* That the employees could have concertedly engaged in a total work stoppage is not in issue. The employees however, under the circumstances, were not entitled to have a partial work

[22] In such circumstances, there would have been no need to *force* employees to work overtime.

stoppage and to work part of the time." [Emphasis Supplied]

Similarly, in *John S. Swift Co.*,[23] the Trial Examiner found (124 NLRB at 412) that:

> "(1) . . . there was no rule, written or oral, requiring that overtime be worked on request, (2) it was not uncommon for employee to refuse to work overtime when requested by a supervisor; and (3) no discipline, discharges or threats of either had been visited upon employees thus refusing to work."

Nevertheless, the Board in *Swift* found a concerted refusal by these employees to work overtime to be unprotected, noting that "employees who were requested to work overtime normally did so in the absence of a valid personal excuse." 124 NLRB at 396. Although counsel for the NLRB attempts to distinguish *Swift* as a case where overtime was "required" (NLRB Br. 6), we submit that overtime was more voluntary in that case than here.

Moreover, the Union's concerted refusal to work scheduled overtime here would not have been protected under controlling Board precedent even if overtime *had* been voluntary and even in the *absence* of such a practice. In *Prince Lithograph Co., Inc.*, 205 NLRB 110 (1973), the union had, as in this case, imposed a ban on overtime as a bargaining tactic and an employee was discharged for complying with that ban even though overtime had been *expressly* made voluntary under the expired contract. The NLRB Administrative Law Judge flatly rejected the argument that the discharged employee's conduct was protected merely because overtime had been voluntary, noting

[23] 124 NLRB 394 (1959), *enf'd on this point*, 227 F. 2d 641 (7th Cir. 1960).

that the Board had only recently held[24] a secondary refusal to work voluntary overtime to be unlawful. He concluded[25] (205 NLRB at 115):

> "If an overtime strike, protected by a voluntary (contractual) right to refuse overtime, for an unlawful object constitutes a violation of the statute, it would appear to be equally true *that an overtime strike to bring economic pressure against a primary employer is unprotected despite the same contractual provision.*" [Emphasis Supplied]

The Board affirmed the Administrative Law Judge's decision "for the reasons given by him", and found that the employee had engaged "at the instance of the Union, in a partial strike by participating in a concerted refusal to work overtime", the identical situation presented here. 205 NLRB at 110, n. 2. The Board has often held activity denominated as a "partial" strike to be unprotected. See *Valley City Furniture Co., supra*, at 1594-1595 (refusal to work overtime); *Honolulu Rapid Transit Company*, 110 NLRB 1806 (1954); *Leprino Cheese Com-*

[24] The Administrative Law Judge in *Prince* relied upon Local No. P-575, *Amalgamated Meat Cutters, etc.*, 188 NLRB 5, where the Board stated at 6, "That the overtime was designated as voluntary in the contract does not, in our view, render the concerted refusal to perform it any the less a strike, or less coercive, *particularly where, as here, the uncontradicted evidence shows it had been the employees' practice to work overtime* during these hours for 5 months at New York, and for 5 years at Kelly." [Emphasis Supplied]

[25] As both the Union and counsel for the NLRB note in their briefs, the Administrative Law Judge determined, despite this conclusion, that the rfusal was "not unprotected" in *Prince* because the contract there *expressly* authorized a refusal by "any and *all*" employees and, since such tactics had been used for many years, clearly contemplated a *concerted* refusal, 205 NLRB at 115. He concluded that he could not ignore the parties' contractually expressed decision to allow this type of partial strike as a bargaining tactic. Of course, there was *no* such agreement at Kearney & Trecker, and it is that portion of his opinion quoted above and the NLRB's affirmance which are important here.

pany, 170 NLRB 601, 606, *enf'd.* 424 F. 2d 184 (10th Cir. 1970), *cert. den'd.* 400 U.S. 915 (1970).

Finally, the NLRB's[26] own Regional Director clearly suggested the availability of a state remedy *in this case,* stating in his June 27, 1972 letter (Co. Ex. 3; A. 33, 52-54):

> "*Dismissal by this agency does not necessarily preclude the Charging Party (Kearney & Trecker) from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act.*" [Emphasis Supplied]

The Regional Director would hardly have suggested other alternatives (i.e., state action) if activities protected by Federal law had been involved.

We submit that the foregoing demonstrates that the Union's actions were not even arguably protected. Of course, not even the Union maintains that its actions were prohibited and, in any case, such argument would be foreclosed by the Regional Director's refusal to issue a complaint (Co. Ex. 3; A. 33, 52-54), which was "illuminated by explanations" and by this Court's decisions in *Insurance Agents* and *Briggs and Stratton.* Being neither protected nor prohibited, there can be no pre-emption under the basic test set forth in *Garmon.*

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[26] In its *amicus* brief filed with this Court, counsel for the NLRB argues, inexplicably, that the conduct in question is arguably protected. The Board's argument is apparently based on the erroneous assumption that the overtime was purely "voluntary" as in *Dow.* If not, such argument is directly contrary to its own decisions, particularly *Swift, Decision, Inc.* and *Prince, supra,* and to the views of its Regional Director, who, unlike the Board, *was* provided with firsthand knowledge of the facts at issue.

B. The *Morton* Exception to the *Garmon* Test Has No Application Here and Should Not be Expanded.

Failing to meet the requirements for pre-emption established in *Garmon,* Petitioners would have this Court radically revise those requirements. Rather than accept this Court's frequent teaching that the Federal law "leaves much to the states",[27] petitioners would leave next to nothing. They would classify all economic weapons as prohibited, protected, or, if neither, as "permitted".[28] (See Pet. Br. 13). In *each* case, the states would be ousted from jurisdiction.

Petitioners' erroneously assert that this Court's decision in *Morton*[29] supports their far-reaching revision of the pre-emption requirements. There, the action was brought pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C. §187, which authorized suit by any person injured as a result of specified secondary conduct

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[27] *Garner et al. v. Teamsters, Local No. 776, et al.,* 346 U.S. 485, 488; *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468, 480-481; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 240.

[28] But see, *American Ship Building Co. v. National Labor Relations Board,* 380 U.S. 300, 338 (Goldberg J. concurring) where Justice Goldberg pointed out that the "choice [of economic weapons] is *not unrestricted*" and that "not all forms of economically motivated strikes are protected *or even permissible* under the labor statutes or the prior decisions of this court", citing *Briggs and Stratton.* (Emphasis added). Certainly, all economic weapons can not be unilaterally invoked by the *Employer.* For example, in *United States Pipe & Foundry,* 180 NLRB 325 (1969), *enf'd.* 442 F. 2d 742 (D.C. Cir. 1971) the Board precluded an employer, which concededly could have locked out its employees, from temporarily reducing benefits to exert pressure during bargaining. The Board examiner noted that the "tactic imposed hardship on the employees while enabling [the Employer] to continue operations without impediment . . . ." 180 NLRB at 328. Although the *same* unequal hardship exists in *this* case, the Board here, opposes utilization of the only effective remedy available.

[29] *Local 20, Teamsters, etc. v. Morton,* 377 U.S. 252 (1964).

prohibited by that Section. The Ohio Federal District Court found that the union had violated Section 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. This Court affirmed that finding of a "clear violation of §303". 377 U.S. at 256.

The Union in *Morton* had, however, engaged in another instance of secondary activity, a direct approach by the Union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was *not* in violation of Section 303 since the Union had approached the neutral employer directly,[30] rather than through its employees, the district court, nevertheless, awarded damages on the basis of state common law.

This Court reversed the latter award, even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting (377 U.S. at 258):

> "The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) *comprehensively* and with great *particularity* 'describes and condemns *specific union conduct* directed to *specific objectives.*'" [Emphasis supplied].

The Court concluded (377 U.S. at 259-260):

> "If the Ohio law of secondary boycott can be applied to proscribe the *same type of conduct* which Congress *focused upon but did not proscribe* when it enacted §303, the inevitable result would be to frustrate

[30] Section 8(b)(4) of the NLRA and Section 303 of the Labor Management Relations Act ("LMRA") have since been amended to specifically cover such conduct. P.L. 86-257, §704.

> the congressional determination to leave this weapon of self-help available." [Emphasis supplied].

Clearly, *Morton* is an exception to the basic "arguably" protected-prohibited test established in *Garmon,* in that it did deny state jurisdiction over certain conduct which was neither protected nor prohibited, It is, however, an exception and not the rule and is, by its very terms, applicable only where Congress has "focused upon"[31] the conduct in question without proscribing it. Although Congress has focused upon secondary boycotts in great detail, by specifically prohibiting certain well defined practices, there has been no comparable regulation of unprotected partial strikes like the crippling refusal of overtime that occurred at Kearney & Trecker.

Petitioners purport to find the requisite "focusing" in the failure of Congress, two years *before Briggs & Stratton,* to enact a proposed amendment to the NLRA which would have prohibited "calling, authorizing, engaging in or assisting — (A) . . . any sit down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises" and would have expressly removed that conduct from the protection of Section 7 of the Act.[32] Since the disruption at

[31] "Focusing" in *Morton* was not simply the Congressional regulation of some aspects of collective bargaining, economic pressure, or picketing, but rather its proscription of "specific union conduct directed to specific objectives" "comprehensively and with great particularity". 377 U.S. at 259-260. Neither the fact that Congressional Acts may govern the replacement of strikers, the lockout or other economic actions nor the fact that the Board has been called upon to determine whether certain tactics are protected even comes close to evidencing the focusing required by *Morton.* Such focusing *would* be present here if Congress had prohibited some partial strike tactics, without prohibiting a concerted refusal to work overtime.

[32] H.R. 3020 80th Cong., 1st Sess., § 7, 12, reprinted at *I Legislative History of the Labor Management Relations Act, 1947,* pp. 176, 204-205.

Kearney & Trecker came not from employees "remaining on the Employer's premises" but rather from their *refusal* to remain for the *full day,* it is apparent that this statute or provision would have had no application in *this* case even if it had passed.

A fuller examination of the very Conference Committee Report[33] relied on by the Union makes it quite clear that the failure of Congress to enact that proposal was definitely *not* based on a decision that "the federal balance warranted only employer self-help" as the Union suggests. (Pet. Br. 21). In explaining its failure to expressly excluded such conduct from the protection of Section 7, the Committee stated (H. Conf. Rep. at 39):

> "[T]here was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act."

It is apparent that the Committee's goal was to *avoid sanctioning* any such conduct, not to restrict the forum in which it might be remedied.

The same Committee Report commented regarding Section 8(b)(1) of the Act (H. Conf. Rep. at 42): "[U]nions that engage in these practices to the injury of another may subject themselves to liability *under ordinary principles of law*", presumably in the civil courts. [Emphasis added]. Further, the Act, as reported by the Committee and enacted, included (A) Section 10(a), authorizing the NLRB to cede jurisdiction over disputes to state agencies, (B) Section 14(b) allowing the states to prohibit or regulate union shop provisions, (C) Section

[33] H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., reprinted at *I Legislative History of the Labor Management Relations Act,* 1947, p. 547 ff.

301 allowing, *inter alia,* state courts to entertain suits for breach of collective bargaining agreements, and (D) Section 303 permitting suits to be brought in state courts to award damages for violations of Section 8(b)(4) of the Act. 29 U.S.C. §§160(a), 164(b), 185 and 187. Such comments and provisions[34] demonstrate no intent, either by that Conference Committee or by the Congress, to *exclude* states from the administration of the Federal Labor law, but rather a design that the states continue to play an active and important role.

Petitioner's assertion that this Court's decision in *Insurance Agents*[35] evidences a congressional intent that partial strike tactics be free of state as well as NLRB regulation is equally erroneous. The issue in *Insurance Agents* was limited to "the scope of the National Labor Relations Board's authority under Section 8(b)(3) of the National Labor Relations Act". 361 U.S. at 478. This Court's opinion was wholly concerned with the interpretation of the *Board's* limited authority under the statute and with the extent to which the use of similar disruptive tactics might be inconsistent with "good faith" bargaining. The decision does *not even discuss* federal pre-emption or state power.

Certainly, the fact that Congress did not grant the NLRB authority to prohibit such practices does not require the conclusion that such activity, which is beyond the protection of federal law, is also foreclosed to state regulation. After all, the same statute *expressly* authorized the states, but not the NLRB, to outlaw or restrict

[34] The Petitioner's statement that "Congress wrote only one provision §14(b), saving state power over the federally regulated subject matter" (Pet. Br. 16) is in error.

[35] *National Labor Relations Board v. Insurance Agents International Union,* 361 U.S. 477 (1960).

union security clauses and expressly provided for State court, but not NLRB, enforcement of collective bargaining agreements.

In short, there has been *no* Congressional action and *no* prior decisions of this Court, which would bar Wisconsin from enjoining the Union's concerted refusal to work overtime. We submit that there is no reason for this Court to impose such a ban at this time. The action by Wisconsin here neither interfered with the right to strike or engage in any other protected activity nor sought to regulate any activity prohibted by Federal law. Therefore, conflict, which is the touchstone for pre-emption, is simply not present. See *Amalgamated Ass'n. of Street, etc. Employees v. Lockridge,* 403 U.S. 274, 285-86 (1971). Wisconsin merely provided a more effective means of remedying a thus far seldom used tactic which, though concerted, has been found beyond the sweeping protection of Section 7. E.g. *John S. Swift Company, Inc., supra.*

Although such conduct is not protected by the Act, petitioners would nevertheless, have this Court confer upon it judicial "protection" by precluding Respondent from securing effective relief through a specialized state tribunal, the WERC, and by leaving to the Respondent, as its sole "defense", self-defeating,[36] self-help tactics.

[36] Although Kearney and Trecker could have suspended, discharged, or even locked out its employees, such steps would have only increased its already enormous production problems, exacerbated the already substantial strain on the bargaining process, and placed the employees in the middle between their union which was directing them not to work and management which would have been ordering them to do the work under threat of discipline. Through the WERC, Kearney & Trecker was able to obtain an order against the perpetrating union rather than the employees. We submit that the procedure utilized by the Employer is far more consistent with the Act's primary goal of reducing "industrial strife or unrest", than the self-help alternative. NLRA §1, 29 U.S.C. §151.

The direct result of the adoption of Petitioner's expansion of *Morton* would be the total elimination of state action in this area, including the beneficial procedure utilized here. We submit that such drastic action has not been sanctioned by Congress.

III. *GARMON'S* PRE-EMPTION OF CONDUCT ONLY ARGUABLY PROTECTED HAS CREATED A 'NO MAN'S LAND' WITHOUT A NECESSARY FORUM FOR JUSTIFIED EMPLOYER COMPLAINTS AND SHOULD BE ABANDONED.

Since the activities of the Petitioners were not even "arguably"[37] protected or prohibited, the right of Wisconsin to enjoin that conduct is clear. However, even if such conduct were "arguably" protected, overriding interests require, we submit, that the state nevertheless be permitted to act.

Employers faced with prohibited or arguably prohibited union activities at least may file a charge with the NLRB and obtain some determination of whether the conduct is prohibited in fact and, if it is, secure relief. In contrast, an employer faced with conduct which is "arguably protected" has no forum whatsoever to secure a determination whether such conduct is, in fact, protected or is unprotected: He cannot obtain relief from the NLRB, nor can he obtain a ruling from that agency — and he is even denied access to the courts and to state labor relations tribunals, such as the WERC.

[37] Of course, Wisconsin could not act if the conduct had been protected, a fact readily acknowledged by the Wisconsin Court (P.A. A-14).

The only avenue open to him under the current *Garmon* rule is resort to "self-help", hoping that the union files charges with Board.[38] If the employer guesses wrong and the union/employee conduct *is* ultimately found protected, the employer exposes himself to NLRB remedies for interference with protected activities and to possible tort claims — an intolerable price to pay for a determination of his rights.[39]

Not surprisingly, this aspect of *Garmon* has frequently been condemned by members of this Court[40] as well as by commentators.[41] In his dissenting opinion in *Lock-*

[38] The employer's plight in the "arguably protected" situation under *Garmon* was recognized by Mr. Justice White, concurring (with the Chief Justice and Mr. Justice Stewart) in *International Longshoremen's Association v. Ariadne Shipping Co.*, 397 U.S. 195, 201 (1970):

> "If the National Labor Relations Act provided an effective mechanism whereby an employer could otain a determination from the National Labor Relations Board as to whether picketing is protected or unprotected, I would agree that the fact that picketing is 'arguably' protected should require state courts to refrain from interfering in deference to the expertise and national uniformity of treatment offered by the NLRB. *But an employer faced with 'arguably protected' picketing is given by the present federal law no adequate means of obtaining an evaluation of the picketing by the NLRB.* The employer may not seek himself a determination from the Board and is left with the unsatisfactory remedy of using 'self-help' against the pickets to try to provoke the union to charge the employer with an unfair labor practice." (Emphasis supplied)

[39] For example, if the conduct, here, had been protected and the Company had suspended or discharged the participants, its liability might well have been huge.

[40] *International Longshoremen's Association, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 201 (Mr. Justice White concurring, joined by The Chief Justice and Mr. Justice Stewart); *Amalgamated Association of Street etc. Employees v. Lockridge*, 403 U.S. 274 (1971) (Mr. Justice White dissenting, joined by The Chief Justice).

[41] Broomfield, "Pre-emptive Federal Jurisdiction over Concerted Trespassory Union Activity," 83 *Harv. L. Rev.* 552 (1970); Come, "Federal Pre-exemption of Labor-Management Relations: Current Problems in the Application of Garmon," 56 *Va. L. Rev.* 1435, 1444 (1970); Cox, "Labor Law Pre-emption Revisited," 85 *Harv. L. Rev.* 1337, 1363 (1972).

ridge, Mr. Justice White (joined by the Chief Justice) stated (403 U.S. at 328):

> "There seems little point in a doctrine that, in the name of national policy, encourages the commission of unfair labor practices, the evils which above all else were the object of the act. Surely the policy of seeking uniformity in the regulation of labor practices must be given closer scrutiny when it leads to the alternative 'solutions' of denying the aggrieved party a hearing or encouraging the commission of a putative unfair labor practice as the price of that hearing."

Similarly, Professor Archibald Cox observed:[42]

> "The short of the matter, therefore, is that in order to avoid the risk of a state court misinterpretation or misfinding, the 'arguably protected' rule shuts the door to determination of the question, and thus denies the hope of remedy for what might well turn out to be a substantive wrong. In effect, it denies the employer a day in court. It seems unlikely that so unjust a formula can long survive unless shored up by other considerations."

The unfairness of this doctrine might be less staggering if the Federal Labor Law were, indeed, uniformly administered and interpreted. But, that is simply not the case. The exceptions to the "exclusive primary jurisdiction" of the NLRB are so numerous and so substantial as to almost swallow the rule. "To summarize, the 'rule' of uniformity which the Court invokes today is at

[42] Cox, *supra*, 85 *Harv. L. Rev.* at 1363. Professor Cox further noted, at 1339: "The weakness of the defense [of the *Garmon* test], coupled with changes in the Court's membership, suggests that the way may soon be open for wider application of state law of strikes and picketing. . . ." Another commentator has noted: "[T]here is a real possibility that the *Garmon II* rules are not secure. Four Justices dissented in *Lockridge*, and, as now constituted, it is not improbable that, given the proper vehicle, the Court will reexamine and reevaluate the *Garmon II* rules." 2 Kheel, *Labor Law*, §9.03, pp. 9-96 - 9-103 (1973). We respectfully submit that this case *is* the proper vehicle.

best a tattered one, and at worst little more than a myth." *Amalgamated etc. Employees v. Lockridge,* 403 U.S. at 318-319. (White, J. dissenting)

For example, both State and Federal courts have been expressly authorized in Section 301 of the LMRA (29 U.S.C. §185) to provide a remedy for the breach of collective bargaining agreements. This Court has recognized their right to do so even though the alleged breach may involve activity which is not only arguably but *actually* protected or prohibited by the Act. E.g. *Smith v. Evening News Assn.,* 371 U.S. 195 (1962). Similarly, both State and Federal courts are authorized by Section 303 of the Act (29 U.S.C. §187) to award damages for conduct violative of the highly technical provisions of Section 8(b)(4), of the Act.

Congress has also expressly authorized states to take jurisdiction where the Board has declined to do so because of the small effect on commerce,[43] authorized the Board to cede its jurisdiction to state agencies[44] and allowed states to regulate or outlaw union security provisions[45] even though such provisions are an extremely important issue in collective bargaining. Further, this Court has recognized the authority of the states to regulate conduct actually prohibited by the Act where such conduct involves issues "deeply rooted in local feeling and responsibility" or an alleged breach of a union's duty of fair representation. E.g. *United Construction Workers v. Laburnum Construction Corp.,* 347 U.S. 656 (1954) (violence); *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) (Defamation); *Taggart v. Weinackers, Inc.,* 397

[43] §14(c) NLRA, 29 U.S.C. §164(c)
[44] §10(a) NLRA, 29 U.S.C. §160(a)
[45] §14(b) NLRB, 29 U.S.C. §164(b)

U.S. 223 (Burger, C. J. concurring) (trespass); *Vaca v. Sipes,* 386 U.S. 171 (1967) (failure to fairly represent).

Finally, Congress, this Court and even the Board itself have approved substantial Board deferral to the arbitration process where the matter is arbitrable under the parties' collective bargaining agreement, even though the issue may involve an arguable or actual unfair labor practice. *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955); *Smith v. Evening News Assn.,* 371 U.S. 195 (1962); *Carey v. Westinghouse Electric Co.,* 375 U.S. 261, 272. See also *Collyer Insulated Wire,* 192 NLRB 837 (1971); §203(d), LMRA, 29 U.S.C. §173(d).

All these exceptions are presumably based upon the existence of interests deemed sufficient to override the perceived congressional goal of uniformity. In *Vaca v. Sipes, supra,* for example, this Court based its decision, at least partly, upon apprehension that the union member would have no forum for his allegations of unfair representation if the General Counsel were to decline to issue an unfair labor practice complaint. *Lockridge, supra,* at 314-5 (White, J. dissenting). In the case of arguably protected conduct, the lack of hearing is not merely a possibility, it is a reality.

Surely the policy of encouraging arbitration or of insuring an adequate forum for unfair representation cases can be no more compelling than providing an employer faced with arguably protected union conduct with

some hearing. As was noted by Mr. Justice White, (dissenting in *Lockridge,* 403 U.S. 330) :

> "The importance in our jurisprudence of the opportunity for a hearing need not be reviewed, but at the very least it teaches that where persons with otherwise justiciable claims cannot obtain a hearing under the law, the law is subject to close scrutiny to discover the circumstances compelling this result. There is precious little in the *Garmon* doctrine that justifies its existence as to §7 activities under this test. Certainly neither the evidence of congressional intent nor the presumed but overdrawn interest in uniformity is adequate to justify denial of a hearing."

The effect of the current "arguably protected" policy is to create a "no man's land" not unlike that in *Guss*[46] whereby just and meritorious causes are totally barred from any forum for the sake of a perceived goal of uniformity. We submit that this "no man's land" no more represents the intent of Congress, here, than did that created in *Guss.*

Accordingly the *Garmon* pre-emption rule, having already been subjected to many exceptions, should be altered and made inapplicable to activities which are only arguably and not actually protected.

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[46] *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (1957).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

DAVID J. CANNON
JAMES C. MALLATT
JACOB L. BERNHEIM
JOHN R. SAPP

Attorneys for Respondent
KEARNEY & TRECKER
CORPORATION

Of Counsel:
MICHAEL, BEST & FRIEDRICH
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Article VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

NATIONAL LABOR RELATIONS ACT, AS AMENDED (61 STAT. 316, 29 U.S.C. §141, et seq.)

Section 7.

"Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

WISCONSIN STATUTES

Sec. 111.06. *What are unfair labor practices.*

* * *

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

* * *

"(h) To take unauthorized possession of the property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."